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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

MGA ENTERTAINMENT, INC., a
California Corporation,

Plaintiff,

v.

DEUTSCHE BANK AG, a German
Company;
BARCLAYS BANK PLC, a British
Corporation;
CREDIT AGRICOLE CORPORATE
AND INVESTMENT BANK, DBA
CALYON, a French Public Limited
Company;
COMMERZBANK
AKTIENGESELLSCHAFT, a German
Corporation; and
SOCIETE GENERALE, a French Public
Limited Company,

Defendants.

CASE NO. CV11-04932 GW (RZx)

[Assigned to Hon. George H. Wu]

**NOTICE OF MOTION AND
MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM
UPON WHICH RELIEF CAN BE
GRANTED (FRCP 12(b)(6)) AND
FOR FAILURE TO AVER FRAUD
WITH PARTICULARITY (FRCP
9(b)); MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
THEREOF**

Complaint Filed: March 28, 2011

Hearing: Feb. 23, 2012

Time: 8:30 a.m.

Courtroom: 10 - Spring Street

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that at the date, time, and place noted above,
3 defendants Société Générale, Deutsche Bank AG, Barclays Bank PLC, Commerzbank
4 Aktiengesellschaft, and Crédit Agricole Corporate and Investment Bank, formerly
5 known as Calyon, will and hereby do move the Court to dismiss MGA Entertainment,
6 Inc.'s ("MGA") Second Amended Complaint ("SAC") because (1) it fails to state a
7 claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules
8 of Civil Procedure and (2) it fails to aver fraud with sufficient particularity pursuant to
9 Rule 9(b) of the Federal Rules of Civil Procedure.

10 This motion is made on the grounds that (1) MGA's five causes of action are
11 time-barred because MGA admits it was on notice of the alleged fraudulent conduct of
12 Smoby SA and Jean-Christophe Breuil no later than June 2007 (SAC ¶¶ 80-83), more
13 than three years before it filed this action, which is outside the applicable statute of
14 limitation periods, and (2) all of MGA's causes of action sound in fraud and MGA has
15 failed to plead with sufficient particularity under Rule 9(b). This motion will be based
16 upon this Notice of Motion and Motion, the Memorandum of Points and Authorities
17 filed herewith, the Request for Judicial Notice concurrently filed herewith, and the
18 papers and pleadings filed in this action and concurrently herewith, and such other
19 papers as may be filed with the Court.

20 This motion is made following the conference of counsel pursuant to L.R. 7-3
21 which took place on December 16, 2011.

1 Filing counsel hereby attests that concurrence in the filing of this document has
2 been obtained from the other signatories of this document.

3
4 Dated: December 23, 2011

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendants Société Générale (“Soc Gen”), Deutsche Bank AG (“Deutsche Bank”), Barclays Bank PLC (“Barclays”), Commerzbank Aktiengesellschaft (“Commerzbank”), and Crédit Agricole Corporate and Investment Bank, f/k/a Calyon (“Calyon”) (together the “Defendants”) respectfully request an order dismissing MGA Entertainment, Inc.’s (“MGA”) Second Amended Complaint (“SAC”) for failure to state a claim upon which relief may be granted and for failure to aver fraud with sufficient particularity. Fed. R. Civ. Proc. 12(b)(6) & 9(b).

I. PRELIMINARY STATEMENT

MGA, a California toy company, knowingly invested in a French toy company on the verge of bankruptcy, Smoby SA (“Smoby”), back in 2007. MGA, however, failed to satisfy its commitment to the French court to submit a safeguard plan for Smoby, resulting in Smoby’s liquidation. MGA now seeks to avoid the consequences of its risky purchase by shifting its losses onto third-party lenders. In its third bite at the apple, MGA now asserts five California causes of action against Defendants, all based on the allegation that Defendants hid Smoby’s true financial status from MGA so that MGA would purchase Smoby and take over its outstanding debts to Defendants. (SAC.) All of these claims fail.

First, MGA had actual notice of Smoby’s true financial condition no later than June 2007 and admits as much in the SAC. (SAC ¶¶ 80-83 (MGA contacted Defendants “**about June 2007**” regarding what it “**had learned [about] Smoby’s true financial state.**”) (emphasis added).) Such admitted “discovery” of “Smoby’s true financial state” started the running of the applicable two- and three-year statutes of limitations no later than June 2007.

Second, MGA’s allegations against Defendants rely on conclusory assertions of “control,” “knowledge,” and a “duty to disclose” that fail to meet the particularity standard mandated under Rule 9(b). These glaring deficiencies in the SAC are too

1 much for MGA to overcome and, given MGA has already amended its complaint
 2 twice — most recently at the insistence of the Court — the SAC should be dismissed
 3 with prejudice.¹

4 **II. BACKGROUND**

5 According to MGA's SAC,² Smoby was plundered by its former CEO, Jean-
 6 Christophe Breuil (SAC ¶¶ 19-20, 34-35), and MGA, at Breuil's invitation, stepped
 7 into the breach to salvage Smoby from bankruptcy. (SAC ¶¶ 48, 50.)

8 MGA alleges that "on or around March 19, 2007, Smoby applied for a
 9 'safeguard procedure' in the French Commercial Court of Lons Le Saunier (the
 10 "Commercial Court"), a form of pre-bankruptcy protection under French law." (SAC
 11 ¶ 48.) Within days of entering bankruptcy, Breuil called MGA's president Isaac
 12 Larian "and asked if MGA was interested in acquiring Smoby." (SAC ¶ 50.) During
 13 this March 22, 2007 conversation, MGA was informed that Smoby was in a "pre-
 14 bankruptcy proceeding[]." (*Id.*)

15 After expressing interest, MGA was provided with and reviewed Smoby's
 16 financial documents from Breuil, including Smoby's outstanding debts. (SAC ¶¶ 51,
 17 54.) MGA was also "provided a cash flow forecast prepared by Ernst and Young,"
 18 which showed Smoby achieving "an EBITDA of approximately 21.5M EUR in the
 19 2007-2008 year." (SAC ¶ 55.) From a review of these materials, MGA concluded
 20 that Smoby was still a desirable acquisition, even though MGA knew Smoby "clearly
 21 had financial problems and excessive debt." (SAC ¶ 56.) Indeed, as early as April 4,
 22 2007, MGA recognized that Smoby's financial distress was serious enough that it

23 ¹ Dismissing without leave to amend would not hinder MGA's substantive rights
 24 because it is still pursuing resolution of the same issues covered by this action in
 25 France. (*See* Docket Entry ("DE") 35 (Forum Non Conveniens ("FNC") Mot.); Defs.'
 Renewed FNC Mot. (concurrently filed herewith).)

26 ² While the Court must accept the well pled factual allegations of the SAC as true, it
 27 need not accept as true legal conclusions cast as factual allegations. *Daghlian v.*
 28 *DeVry Univ.*, 461 F. Supp. 2d 1121, 1125 (C.D. Cal. 2006). Defendants, however, do
 not admit that any of the alleged facts are true.

1 required someone with “proper techniques” to turn Smoby around. (SAC ¶ 56.)
 2 MGA determined that it had those “proper techniques” and submitted a bid to acquire
 3 Smoby. (SAC ¶ 58.) As part of its offer, MGA “proposed an exclusive five week due
 4 diligence period to conduct [a] legal and financial review.” (*Id.*)

5 On April 5, 2007, MGA’s French counsel, Jean-Paul Poulain, attended a
 6 meeting at the French Interministerial Committee for Industrial Restructuring with
 7 Defendants, the alleged holders of Smoby’s debt. (SAC ¶¶ 52, 59.) While MGA’s
 8 French counsel was authorized to negotiate with Defendants regarding MGA’s
 9 acquisition of Smoby’s debt, he was not authorized to make any offer in connection
 10 with the purchase of Smoby.³ (SAC ¶ 59.) No agreement was reached regarding the
 11 acquisition by MGA of Smoby’s debt at that time. (SAC ¶ 59.)

12 MGA further alleges that, on March 27, 2007, Deutsche Bank proposed
 13 converting its interest in Smoby’s debt to equity and the rest of the Defendants
 14 supported this offer. (SAC ¶ 61.) Deutsche Bank’s offer was rejected, however, after
 15 meeting resistance in the French press and from Smoby. (SAC ¶¶ 61-62.) Instead,
 16 MGA’s offer was approved by Smoby’s employees and by the Commercial Court, and
 17 was ultimately accepted by Breuil on April 6, 2007. (SAC ¶¶ 62-63.)

18 After its offer to acquire Smoby had been approved, MGA “proceeded with its
 19 due diligence.” (SAC ¶ 64.) As part of its due diligence, MGA received information
 20 from and relied upon Ernst and Young as well as the statutory auditors Grant
 21 Thornton, which certified Smoby’s financial statements for 2005 and 2006 as
 22 accurate. (SAC ¶ 64.) In April 2007, MGA also had access to and reviewed

23 ³ MGA exhibits a pattern of shifting the alleged role and competence of its French
 24 counsel to suit its current pleadings. For example, MGA has praised its French
 25 counsel as “highly regarded” (Request for Judicial Notice (“RJN”) Ex. 1 (Original
 26 Compl.) ¶ 46), only to subsequently excoriate him as being less than a quality
 27 advocate (DE 1, Ex. A (FAC) ¶ 46 (“MGA was unable to secure a quality law firm”)).
 28 The Court may properly discount such inconsistent pleadings of facts. *Ellingson v.*
Burlington N., Inc., 653 F.2d 1327, 1329-30 (9th Cir. 1981); *Bradley v. Chiron Corp.*,
 136 F.3d 1317, 1324 (Fed. Cir. 1998) (Court may strike the changed allegations as
 “false and sham”).

1 financials for Smoby's subsidiaries. (SAC ¶ 65.) MGA alleges, however, that these
 2 due diligence materials were false because they "omitted the existence . . . [of]
 3 offshore companies, and the improper diversions of money."⁴ (SAC ¶ 66.)

4 Nevertheless, MGA exercised its call option and purchased the Smoby shares
 5 on May 7, 2007 from Breuil and a trust held by Breuil; the shares were not purchased
 6 from, nor sold by, Defendants. (SAC ¶ 76.) In its May 7, 2007 letter exercising its
 7 call option, MGA specifically waived its prior purchase condition requiring approval
 8 of a safeguard plan for Smoby, noting instead Defendants preferred MGA first
 9 complete its purchase of Smoby's shares. (*Id.*) Smoby's shares — and control of
 10 Smoby — were transferred to MGA on May 11, 2007. (SAC ¶ 77.)

11 MGA's nominees to Smoby's Board of Directors were in place and oversaw
 12 Smoby's day-to-day operations by August 2007. (SAC ¶ 78.) **"After the acquisition**
 13 **[on May 11, 2007,] MGA soon began to realize that the true financial situation of**
 14 **Smoby differed wildly from the materials . . . provided to it pre-acquisition."**

15 (SAC ¶ 80 (emphasis added).) In fact, MGA reassessed Smoby's financial forecast
 16 for 2007-2008 from an EBITDA of 21.5M EUR to a loss of 20-30M EUR. (*Id.*)
 17 According to MGA, "[i]t eventually emerged that the sales of Smoby's international
 18 subsidiaries had been materially misrepresented to MGA" and that "Smoby was in
 19 dire financial circumstances as a result of the prior fraudulent activities." (SAC ¶¶ 80-
 20 81.) No later than June 2007, MGA contacted Defendants' alleged representatives,
 21 including Constance Verroust of Soc Gen and Mark Askew of Commerzbank,
 22 "regarding what [it] had learned, and offered proposals with them . . . that were
 23 reasonable in the face of Smoby's true financial state." (SAC ¶ 83.) By September
 24

25 ⁴ MGA also asserts that Defendants, "[a]s lenders" to Smoby, "had access to Smoby's
 26 true financial information" and withheld this information from MGA. (SAC ¶¶ 73-
 27 74.) According to MGA, Defendants allegedly "encouraged MGA to close the deal,
 28 assuring MGA that no formal safeguarding procedure would be necessary and they
 would accept a substantial discount on their loans." (SAC ¶ 75.)

27, 2007, however, Defendants allegedly “disavowed their promise to discount [Smoby’s] debt.” (SAC ¶ 85.)

In October 2007, reports appeared in the French press detailing an investigation by French authorities into allegations of Breuil funneling money away from Smoby and into foreign front companies. (RJN Exs. 2, 3.) At the same time, the Commercial Court ordered Smoby into bankruptcy (“redressement judiciaire”) and in March 2008, Smoby was put into judicial liquidation with liquidation orders issued March 3 and 10, 2008. (SAC ¶¶ 87, 90; RJN Exs. 4-5 (French Court Orders referring to March 3 and 10, 2008 orders approving sale of Smoby’s assets).)

III. PROCEDURAL HISTORY

In July 2008, Defendants filed an action in France against MGA — as Smoby’s successor — for the 250M+ EUR debt owed them by Smoby. (SAC ¶ 92.) MGA has actively availed itself of the French courts, pursuing all available remedies, including in the French Supreme Court. Prior to this action, MGA also instigated its own litigations in France against a court-appointed administrator of Smoby, alleging he had committed a tort directed at MGA in California (collectively the “French Litigation”). (See DE 35 (FNC Mot.); Defs.’ Renewed FNC Mot.)

Dissatisfied with the progress of the French Litigation, MGA filed this action in California Superior Court on March 28, 2011 and a subsequent First Amended Complaint (“FAC”) on May 9, 2011. (RJN Ex. 1 (Original Compl.); DE 1, Ex. A (FAC).) Defendants then removed the case to federal court and filed a motion to dismiss for forum non conveniens. (DE 1 (Removal Notice) & 35 (FNC Mot.).) The Court denied the motion without prejudice, noting that the FAC was too vague to allow the Court to even reach the merits of the motion. (See DE 67 & 69, RJN Ex. 6 (Oct. 24, 2011 Hr’g Tr.) at 3:24-4:7.) Consequently, the parties stipulated to, and MGA has since filed, the SAC. (DE 71 (Joint Stip); DE 75 (SAC).)

1 In its SAC, MGA asserts five causes of action: (1) First Cause of Action for
 2 liability of management principals under Cal. Corp. Code § 25504 against Soc Gen
 3 and Calyon; (2) Second Cause of Action for liability of materially assisting persons
 4 under Cal. Corp. Code § 25504.1 against all Defendants; (3) Third Cause of Action
 5 for fraudulent nondisclosure against all Defendants; (4) Fourth Cause of Action for
 6 conspiracy to defraud against all Defendants; and (5) Fifth Cause of Action for aiding
 7 and abetting fraud against all Defendants.

8 **IV. ARGUMENT**

9 In its SAC, and with an eye at avoiding dismissal for forum non conveniens,
 10 MGA attempts to anchor its claims against Defendants — all foreign entities — in
 11 California law. MGA fails, however, to articulate a claim on which relief may be
 12 granted because (1) MGA's causes of action are time-barred and (2) MGA's causes of
 13 action sound in fraud but are not pled with sufficient particularity.

14 **A. Motion To Dismiss Standard Of Review**

15 When determining the sufficiency of a complaint under Rule 8(a), the court
 16 must determine whether or not the factual allegations in the complaint suffice to move
 17 the claims “across the line from conceivable to plausible.” *Ashcroft v. Iqbal*, 129 S.
 18 Ct. 1937, 1950-52 (2009). Merely asserting facts consistent with a defendant's
 19 liability or a “formulaic recitation of the elements of a cause of action” is patently
 20 insufficient. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see Iqbal*, 129 S.
 21 Ct. at 1949. Instead, the complaint must state “enough fact[s] to raise a reasonable
 22 expectation that discovery will reveal evidence of [the misconduct alleged].”
 23 *Twombly*, 550 U.S. at 556. A court need not accept as true “allegations that are
 24 merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re*
 25 *Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

26 Where fraud claims are alleged, however, such allegations must also meet the
 27 heightened pleading requirements of Rule 9(b). *Tellabs, Inc. v. Makor Issues &*

1 *Rights, Ltd.*, 551 U.S. 308, 319 (2007) (“Rule 9(b) applies to all averments of fraud or
 2 mistake”); *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d
 3 1047, 1055 (9th Cir. 2011) (“Because Rule 8(a) requires the pleading of a plausible
 4 claim, . . . we hold that claims of fraud or mistake . . . must, in addition to pleading
 5 with particularity, also plead plausible allegations.”) (internal citations omitted).

6 **B. MGA’S Causes Of Action Are Time-Barred**

7 “A complaint is subject to dismissal for failure to state a claim if the allegations,
 8 taken as true, show the plaintiff is not entitled to relief. If the allegations, for example,
 9 show that relief is barred by the applicable statute of limitations, the complaint is
 10 subject to dismissal for failure to state a claim” *Jones v. Bock*, 549 U.S. 199, 214
 11 (2007); *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969
 12 (9th Cir. 2010) (dismissal under Rule 12(b)(6) appropriate where claim is barred by
 13 the applicable statute of limitations). Here, the allegations of the SAC and the
 14 judicially noticeable public record leave no doubt that MGA’s causes of action are
 15 time-barred because MGA was on notice of the alleged financial fraud at Smoby no
 16 later than June 2007, more than three years prior to MGA filing this action.

17 **1. MGA’s First and Second Causes of Action Are Time-Barred Under**
 18 **Cal. Corp. Code § 25506(b)’s Two-Year “Discovery” Statute of**
 19 **Limitation**

20 MGA’s First and Second Causes of Action must be brought within “two years
 21 after the discovery by the plaintiff of the facts constituting the violation” and no more
 22 than “five years after the act or transaction constituting the violation.” Cal. Corp.
 23 Code § 25506(b) (statute of limitations applicable to, *inter alia*, “liability created
 24 under . . . Section 25504 or Section 25504.1”); *Deveny v. Entropin, Inc.*, 139 Cal.
 25 App. 4th 408, 419 (2006); *see also Lubin v. Sybedon Corp.*, 688 F. Supp. 1425, 1452
 26 (S.D. Cal. 1988). These claims are based on MGA’s contention that Defendants hid
 27 Smoby’s true financial status from MGA so that MGA would purchase Smoby and
 28

1 take over its outstanding debts owed Defendants. Therefore, MGA's claims must
2 have been brought within two years of "discovery" of Smoby's true financial status.

3 (a) **Inquiry Notice Triggers the Accrual of Causes of Action Under**
4 **§§ 25504 and 25504.1**

5 The two-year statute of limitation for Cal. Corp. Code §§ 25504 and 25504.1
6 begins to run once the plaintiff has been put on inquiry notice of the facts constituting
7 the violation of which the plaintiff complains. *See, e.g., Deveny*, 139 Cal. App. 4th at
8 423 ("We conclude that inquiry notice is sufficient to trigger the running of the
9 limitations period under section 25506."); *see also Kramas v. Sec. Gas & Oil Inc.*, 672
10 F.2d 766, 770 (9th Cir. 1982) (inquiry notice sufficient under Cal. Corp. Code
11 § 25506); *In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates*, 636 F. Supp.
12 1138, 1170 (C.D. Cal. 1986).

13 "Inquiry notice arises in a securities action when circumstances suggest to an
14 investor of ordinary intelligence the possibility that he has been defrauded." *Deveny*,
15 139 Cal. App. 4th at 428; *see also Debro v. L.A. Raiders*, 92 Cal. App. 4th 940, 950
16 (2001) ("inquiry notice" is triggered when the aggrieved party learns of "facts that
17 would lead a reasonably prudent person to suspect fraud"). Often, such circumstances
18 are referred to as "storm warnings." *Deveny*, 139 Cal. App. 4th at 428. "Storm
19 warnings may be found whenever there are any financial, legal, or other data, such as
20 public disclosures in the media about the financial condition of the corporation that
21 would tend to alert a reasonable person to the likelihood of fraud." *Id.*

22 The appearance of "storm warnings" gives rise to a duty of inquiry on the part
23 of a plaintiff. *Id.* If no inquiry is made, knowledge is imputed to the plaintiff as of the
24 date of the "storm warnings." *Id.* If, however, the plaintiff makes some inquiry,
25 knowledge is imputed when the exercise of reasonable diligence would have revealed
26 the fraud. *Id.* While a defendant bears the burden to demonstrate when "storm
27
28

warnings” appeared, the burden shifts to the plaintiff to demonstrate reasonable inquiry or what reasonable inquiry would have revealed. *Id.* at 429.

(b) MGA’s Admitted “Storm Warnings”

MGA’s allegations in the SAC confirm that MGA had actual notice of the alleged fraud — and at a minimum inquiry notice of facts that would lead a reasonably prudent person to suspect fraud — **by June 2007.**

MGA states unequivocally that by June 2007 “it became clear that Smoby was in dire financial circumstances **as a result of the prior fraudulent activities**” and MGA contacted Defendants “**regarding what it had learned . . . in the face of Smoby’s true financial state.**” (SAC ¶¶ 82-83 (emphasis added).) Such an admission establishes categorically that MGA was on actual notice no later than June 2007 of the alleged fraudulent activities at Smoby, and this actual notice triggered the statute of limitations. *See Deveny*, 139 Cal. App. 4th at 423.

Moreover, the public record and MGA’s own allegations demonstrate that sufficient “storm warnings” existed between 2007 and 2008 to put MGA on at least inquiry notice. These “storm warnings” included, *inter alia*:

- March 19, 2007: Smoby was placed into a French “safeguarding procedure” (pre-bankruptcy procedure). (SAC ¶ 48.)
- April 4, 2007: MGA acknowledged it was “aware of the Smoby Group’s precarious financial position.” (SAC ¶ 58; RJN Ex. 7 (April 4, 2007 Letter).)⁵
- September 2007: After acquiring Smoby, MGA received reports of Smoby’s operations indicating losses “staggeringly larger than represented in the financial statements,” indicating “the true financial situation of Smoby differed wildly from the materials . . . provided to [MGA] pre-acquisition.” (SAC ¶ 80.) “MGA learned about, among other things, the improper withdrawals of monies by Messrs. Breuil and Bondier, and the improper accounting at Smoby Espana and Eurotoys.” (*Id.*) **Even if the earlier financials MGA reviewed were fraudulent and not “storm warnings,”**

⁵ Documents referenced in a complaint but not attached may be attached to a Rule 12(b)(6) motion to show the documents do not support a plaintiff’s claim. *Knievel v. ESPN*, 393 F.3d 1068, 1076-77 (9th Cir. 2005); *see also Parrino v. FHP, Inc.*, 146 F.3d 699, 706 & n.4 (9th Cir. 1998) (incorporation by reference doctrine also includes documents deliberately not mentioned in the complaint).

1 **these later ones, with their “staggering” and “wildly differing results,”**
 2 **certainly were.** Any reasonable person would have suspected fraud at this
 3 point, if not sooner.

- 4 • September 2007: Smoby’s forecasted performance plummeted from a
 5 previous forecast from Ernst and Young of a 21.5M EUR profit (SAC ¶ 55),
 6 to a 20-30M EUR loss. (SAC ¶ 80.)
- 7 • October 2007: Articles in French press detailed the criminal investigation of
 8 Breuil, including allegations that he had funneled money from Smoby
 9 through foreign front companies. (RJN Exs. 2, 3 (Oct. 19, 2007 *Jura*
 10 *Libertaire* & Oct. 22, 2007 *Boursier* articles).)
- 11 • October 2007: Smoby was ordered into bankruptcy. (SAC ¶ 87.)
- 12 • March 2008: The Commercial Court issued liquidation orders for Smoby on
 13 March 3 and 10, 2008. (SAC ¶ 90; RJN Exs. 4, 5.)

14 All this occurred more than two years before MGA filed its Original Complaint.

15 (c) **“Storm Warnings” Put MGA On Notice No Later Than June**
 16 **2007, Starting the Accrual of the Two-Year Statute of**
 17 **Limitations**

18 The allegations in the SAC make it indisputable that MGA had actual notice of
 19 Smoby’s alleged “prior fraudulent activities” no later than June 2007. (SAC ¶ 82.)
 20 Shortly after acquiring Smoby in May 2007, MGA acknowledges it (1) received
 21 reports showing “staggering” losses not in line with its prior projections, (2) learned
 22 of improper withdrawals of cash by Messrs. Breuil and Bondier, (3) learned of
 23 improper accounting at subsidiary units, (4) learned that “[m]illions of dollars in
 24 turnover indentified as ‘final sales’ were intercompany transfers made at cost or even
 25 a loss,” (5) learned that “millions in debt owed by subsidiaries . . . had not been
 26 reported,” and (6) realized by June 2007 “that Smoby was in dire financial
 27 circumstances ***as a result of the prior fraudulent activities.***” (SAC ¶¶ 80-83
 28 (emphasis added).) MGA concedes that once it had acquired Smoby and was in
 “control” of Smoby’s records and day-to-day operations by August 2007 (SAC ¶¶ 78,
 80), it discovered “that the true financial situation of Smoby differed wildly from the
 materials . . . provided to it pre-acquisition.” (SAC ¶ 80.) These admissions go
 directly to when MGA “discovered” the misrepresentations on which it bases its

1 claims against Defendants and triggers the statute of limitations clock.⁶ *See, e.g., In re*
 2 *Infonet Servs. Sec. Litig.*, 310 F. Supp. 2d 1106 (C.D. Cal. 2003) (granting with
 3 prejudice motion to dismiss where “storm warnings” provided plaintiffs with inquiry
 4 notice triggering the running of the statute of limitations before plaintiffs filed their
 5 claim); (SAC ¶¶ 80-83). MGA therefore only had two years in which to bring an
 6 action under Cal. Corp. Code § 25504 or 25504.1, making the time-bar date for any
 7 such claim June 2009. MGA failed to file the instant action until March 28, 2011.

8 Furthermore, the numerous “storm warnings” listed *supra* clearly establish
 9 MGA had at least inquiry notice of the alleged fraudulent activities and thereby had a
 10 duty, as the acquirer of Smoby, to investigate Smoby’s true financial state. *See In re*
 11 *Infonet Servs. Sec. Litig.*, 310 F. Supp. 2d 1106. Indeed, from March 2007 through
 12 October 2007, MGA was always aware that Smoby was in bankruptcy, was in debt,
 13 and that its financial position was deteriorating rapidly. By October 2007, the French
 14 press was broadcasting the investigation by French authorities into Breuil’s alleged
 15 misappropriation and diversion of funds from Smoby. (RJN Exs. 2, 3.) Any one of
 16 these “storm warnings,” let alone all of them, would place a prudent person on notice
 17 that Smoby was financially in trouble, probably due to internal fraud, triggering a duty
 18 to investigate. *See, e.g., Stichting Pensionenfonds ABP v. Countrywide Fin. Corp.*,
 19 No. 10-CV-07275 MRP (MANx), 2011 WL 3558173 at *7-9, --- F. Supp. 2d ----
 20 (C.D. Cal. Aug. 9, 2011).

21 Nor may MGA avoid the consequences of its allegations in the SAC by
 22 asserting that, even though it had access to and control over all of Smoby’s records as
 23 of the date it acquired Smoby — May 11, 2007 (SAC ¶ 77), it should not be credited
 24 with “discovery” of the alleged fraud until a much later date. Such a position is

25 ⁶ MGA also cannot avoid the “storm warnings” of the Commercial Court ordering
 26 Smoby’s liquidation on March 3 and 10, 2008. (SAC ¶ 90; RJN Exs. 4, 5.) It strains
 27 credulity that a prudent person would not be put on notice that an acquisition was
 28 possibly fraudulently induced where the acquisition is forced into liquidation within
 mere months of being acquired. *See Kramas*, 672 F.2d at 771.

contrary to MGA's explicit admissions of discovery by June 2007 (SAC ¶¶ 80-83), and is contrary to MGA's allegations that "access to Smoby's true financial information" is enough to provide someone with knowledge about "Smoby's financial situation." (*See, e.g.*, SAC ¶ 73.)

MGA therefore had sufficient notice by June 2007 to start the accrual of its claims against Defendants under Cal. Corp. Code §§ 25504 and 25504.1, rendering its First and Second Causes of Action time-barred. These causes of action should, accordingly, be dismissed for failing to state a claim. *See, e.g., Stichting Pensionenfonds ABP*, 2011 WL 3558173, at *7 ("A motion to dismiss is appropriate where the complaint, documents referred to therein, and public press reports yield no other plausible inference than that a reasonably diligent plaintiff should have discovered facts sufficient to state a claim more than two years before suit was actually filed."); *see also In re Am. Funds Sec. Litig.*, 556 F. Supp. 2d 1100, 1108 (C.D. Cal. 2008) (vacated and remanded on other grounds by *In re Am. Funds Sec. Litig.*, 395 Fed. Appx. 485 (9th Cir. 2010)).

2. MGA's Third, Fourth, and Fifth Causes of Action For Fraud Under California Law Are Time-Barred

MGA's Third, Fourth, and Fifth Causes of Action for fraud, conspiracy to defraud, and aiding and abetting fraud are subject to a three-year statute of limitations. Cal. Code Civ. Proc. § 338(d); *Miller v Bechtel Corp.*, 33 Cal. 3d 868, 873-74 (1983). These fraud claims are also based upon MGA's allegation that Defendants purposefully withheld Smoby's true financial status from MGA.

(a) Inquiry Notice Triggers the Accrual of California Fraud Causes of Action Under Cal. Civ. Proc. Code § 338(d)

California fraud claims must be brought no later than three years from the date of discovery. Cal. Civ. Proc. Code § 338(d). Courts interpret discovery in the context of fraud "to mean not when the plaintiff became aware of the specific wrong alleged,

1 but when the plaintiff suspected or should have suspected that an injury was caused by
 2 wrongdoing. The statute of limitations begins to run when the plaintiff has
 3 information which would put a reasonable person on inquiry.” *Kline v. Turner*, 87
 4 Cal. App. 4th 1369, 1374 (2001); *see Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 397-98
 5 (1999); *Miller*, 33 Cal. 3d at 874-75; *Vai v. Bank of Am. Nat’l Trust & Sav. Ass’n*, 56
 6 Cal. 2d 329, 343 (1961).

7 The Ninth Circuit also applies this inquiry notice to California fraud causes of
 8 action. *Platt Elec. Supply, Inc. v. EOFF Elec., Inc.*, 522 F.3d 1049, 1054 (9th Cir.
 9 2008) (“So long as there is a reasonable ground for suspicion, the plaintiff must go out
 10 and find the facts; she cannot wait for the facts to find her.”); *Hamilton Materials, Inc.*
 11 *v. Dow Chem. Corp.*, 494 F.3d 1203, 1206-07 (9th Cir. 2007).

12 (b) **MGA’s Admitted “Storm Warnings” Put It On Notice No**
 13 **Later Than June 2007, Starting the Accrual of the Three-Year**
 14 **Statute of Limitations for Its Fraud Claims**

15 As set forth above, MGA admits in the SAC it was on actual notice — and at a
 16 minimum inquiry notice — no later than June 2007. (SAC ¶¶ 80-83.) The statute of
 17 limitations for MGA’s Third, Fourth, and Fifth Causes of Action for fraud therefore
 18 expired three years later in June 2010. MGA, however, did not file this action until
 19 March 28, 2011, rendering these three causes of action time-barred.⁷

20 **C. MGA Fails To Plead With Sufficient Particularity**

21 Under Rule 9(b), “a party must state with particularity the circumstances
 22 constituting fraud.” Fed. R. Civ. Proc. 9(b); *see also Rubke v. Capitol Bancorp Ltd.*,
 23 551 F.3d 1156, 1161 (9th Cir. 2009) (“the complaint must set forth what is false and
 24 misleading about a statement, and why it is false”); *Moore v. Kayport Package*

25 _____
 26 ⁷ Even if the later dates of Smoby’s ordered liquidations are used as the date of accrual
 27 for MGA’s fraud causes of action (SAC ¶ 90; RJN Exs. 4, 5), MGA’s fraud claims
 28 would still be time-barred, having been filed eighteen days after the expiry of the
 applicable three-year statute of limitations. Cal. Code Civ. Proc. § 338(d).

1 *Express, Inc.*, 885 F.2d 531, 541 (9th Cir. 1989) (“Rule 9(b) requires that the pleader
2 state the time, place, and specific content of the false representations as well as the
3 identities of the parties to the misrepresentation.”).

4 Here, MGA’s five causes of action are either rooted in fraud (Second - Fifth
5 Causes of Action (SAC ¶¶ 108-161)), or sound in fraud (First Cause of Action (SAC
6 ¶¶ 98-107)), and are therefore subject to Rule 9(b)’s heightened pleading standard.
7 *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003) (“[T]he
8 plaintiff may allege a unified course of fraudulent conduct and rely entirely on that
9 course of conduct as the basis of a claim. In that event, the claim is said to be
10 ‘grounded in fraud’ or to ‘sound in fraud,’ and the pleading of that claim as a whole
11 must satisfy the particularity requirement of Rule 9(b).”). The fact that MGA only
12 asserts state law causes of action is of no consequence, because Rule 9(b) applies
13 equally to state law causes of action. *Id.* at 1103 (“Rule 9(b)’s particularity
14 requirement applies to state-law causes of action.”). Each is addressed *seriatim*.

15 **1. MGA’s First Cause of Action (Cal. Corp. Code § 25504) Fails**
16 **To Establish The Requisite Control**

17 MGA only asserts its First Cause of Action for control-person liability under
18 Cal. Corp. Code § 25504 against defendants Soc Gen and Calyon. (SAC ¶¶ 98-107.)
19 Section 25504 creates joint and several liability for “[e]very person who directly or
20 indirectly controls a person liable under Section 25501 . . . unless the other person
21 who is so liable had no knowledge of or reasonable grounds to believe in the existence
22 of the facts by reason of which the liability is alleged to exist.” Cal. Corp. Code
23 § 25504. Section 25501 creates individual liability for anyone who violates Cal.
24 Corp. Code § 25401, which makes it unlawful “for any person to offer or sell a
25 security” in California “by means of any written or oral communication which
26 includes an untrue statement of a material fact or omits to state a material fact
27
28

1 necessary in order to make the statements made . . . not misleading.” Cal. Corp. Code
2 §§ 25401, 25501.

3 MGA must therefore plead (1) that Soc Gen and Calyon each separately
4 “controlled” Smoby (and Breuil), (2) that a material misrepresentation was directed to
5 MGA in California by Smoby in conjunction with offering to sell shares in Smoby,
6 and (3) that Soc Gen and Calyon each separately had reasonable grounds to know of
7 the material misrepresentation. *See Bains v. Moores*, 172 Cal. App. 4th 445, 476-79
8 (2009). MGA fails in pleading these elements with requisite particularity.⁸

9 MGA must plead facts with particularity “from which an inference can be
10 drawn that the defendant had the power to control the general affairs of the entity
11 primarily liable at the time the entity violated the securities laws . . . [and] had the
12 requisite power to directly or indirectly control or influence the specific corporate
13 policy which resulted in the primary liability.” *Hellum v. Breyer*, 194 Cal. App. 4th
14 1300, 1317 (2011) ; *see also Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1065 (9th
15 Cir. 2000) (“Control” requires pleading allegations concerning “the defendant’s
16 participation in the day-to-day affairs of the [primary violator] and the defendant’s
17 power to control [the primary violator’s] corporate actions.”).⁹ Indeed, MGA must
18 plead facts showing “the times, dates, and places that such control allegedly
19 occurred.” *In re Downey Sec. Litig.*, No. CV 08-3261-JFW (RZx), 2009 WL 736802,
20 at *15 (C.D. Cal. March 18, 2009).

21 ⁸ It is irrelevant that fraud is not a required element under Cal. Corp. Code § 25504
22 because MGA specifically incorporates by reference its common allegations of fraud
23 asserted throughout the SAC, implicating Rule 9(b)’s heightened particularity
24 standard. (SAC ¶ 98); *see Vess*, 317 F.3d at 1103 (“In cases where fraud is not a
25 necessary element of a claim, a plaintiff may choose nonetheless to allege in the
complaint that the defendant has engaged in fraudulent conduct. . . . In that event, the
claim is said to be ‘grounded in fraud’”); *see also Kainos Labs., Inc. v. Beacon
Diagnostics, Inc.*, No. C-97-4618 MHP, 1998 WL 2016634, at *16 (N.D. Cal. Sept.
14, 1998).

26 ⁹ In expounding the requirements for “control” under § 25504, the Court may properly
27 look towards analogous federal control-person liability statutes. *Durham v. Kelly*, 810
28 F.2d 1500, 1505 (9th Cir. 1987); *see also Kamen v. Lindly*, 94 Cal. App. 4th 197, 203
(2001).

Here, MGA's allegations of "control" never reach the threshold of establishing that Soc Gen and Calyon each "had the power to control the general affairs" and the particular corporate policy of Smoby (or Breuil, let alone any involvement in the actual sale of Smoby shares to MGA). Rather, the SAC only demonstrates that Soc Gen and Calyon had routine, commercial borrower-lender relationships with Smoby. MGA's inadequate "control" allegations include:

- Soc Gen had a longstanding banking relationship with the Breuil family. (SAC ¶ 103(a).)
- Soc Gen had a 10.3% equity stake in Smoby and 6.6% of its voting rights through a subsidiary. (SAC ¶ 103(b).)
- Soc Gen "orchestrat[ed]" Smoby's 2005 takeover of a rival company, Berchet, in which Soc Gen held debt. (SAC ¶¶ 18, 23-24, 103(c).)
- Soc Gen and Calyon's rights as lenders and requirements under the September 6, 2005 Granting of Credit Agreement and the October 30, 2006 Bridge Loan (the "Loan Agreements"). (SAC ¶¶ 31, 39-41, 66, 103(d)-(j), 103(l)-(m).)
- Soc Gen and Calyon's extension of credit to Smoby despite its overly indebted and insolvent state. (SAC ¶ 103(k).)
- Soc Gen and Calyon allowing Breuil to hold them out as "partners" in an October 19, 2006 press statement. (SAC ¶ 103(n).)

First, conclusory allegations about a prior banking relationship are insufficient. MGA never asserts specific facts to establish Soc Gen had power over Smoby's day-to-day general affairs and never asserts who, what, when, where, or how Soc Gen's and Breuil's alleged "longstanding" relationship provided Soc Gen "control."

Second, mere allegations of ownership of a minority stake or minority share of voting rights does not establish control. Indeed, courts have held lenders with even larger equity stakes and voting rights than what is alleged here not to be "controlling persons." *See, e.g., Metge v. Baehler*, 762 F.2d 621, 630-32 (8th Cir. 1985) (lender to primary violator held not to be a "controlling person" despite the fact that it was the primary lender, had the ability to foreclose on the loans, held 17-18% of the borrower's stock, and held a controlling block of its subsidiaries' stock). Nor are

1 there detailed allegations about what votes took place, when, and where that would
2 have granted Soc Gen or Calyon power to direct Smoby's operations.

3 Third, the terms and conditions MGA points to in the Loan Agreements are
4 ubiquitous lender requirements found in typical loan agreements. The plain intent
5 (and limit) of such requirements is to safeguard the lender's investment and debt
6 position, not to provide the lender with power over the general or day-to-day affairs of
7 the borrower — nor was such power conveyed here. *See, e.g., Wagner v. Benson*, 101
8 Cal. App. 3d 27, 35 (1980) ("Normal supervision of the enterprise by the lender for
9 the protection of its security interest in loan collateral is not 'active participation'" and
10 does not take the lender beyond its usual domain.). Indeed, more than a lender-
11 borrower relationship must be established for the lender to be treated as a controlling
12 person of the borrower. *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151,
13 1162-63 (9th Cir. 1996); *see also Metge*, 762 F.2d 621; *Schlifke v. Seafirst Corp.*, 866
14 F.2d 935, 948-50 (7th Cir. 1989) (bank that was lender to primary violator was not a
15 "controlling person" despite fact it had made extensive loans to the borrower and had
16 directed the borrower to sell certain assets to meet its loan obligations).

17 Moreover, MGA relies solely on the provisions of the Loan Agreements to
18 establish Soc Gen and Calyon's supposed "control" over Smoby. Mere access to
19 financial records and statements, without allegations of involvement in the preparation
20 of those materials, is not sufficient to establish control. *See Paracor Fin., Inc.*, 96
21 F.3d at 1163-64.; *see also Burnstein v. Graves*, No. C 92-3623 FMS, 1994 WL
22 792541, at *5 (N.D. Cal. Dec. 20, 1994) ("The claim that outside professionals control
23 primary violations by participating in the disclosure process has been uniformly
24 rejected."). While MGA alleges Soc Gen and Calyon had "access" to Smoby's
25 financials under the terms of the Loan Agreements, it never alleges with particularity
26 the who, what, when, where, or how this access was used, or how simple access
27 equated to active participation in directing the alleged "cooking" of Smoby's books.

1 Fourth, MGA offers no particular factual allegations about how the extension of
 2 credit to Smoby, even if in an insolvent state, provided Soc Gen or Calyon with power
 3 over Smoby's corporate policies and day-to-day decisions. Indeed, MGA
 4 acknowledges there was only an extension of credit, not a conversion of credit into
 5 equity ownership. In fact, the agreement between Smoby and its lending syndicate to
 6 extend a bridge loan to Smoby was ratified by the Commercial Court. (RJN Ex. 8.)
 7 Nor does MGA provide facts supporting the existence of a "partnership" between Soc
 8 Gen, Calyon, and Smoby other than a bald assertion made in a press statement. No
 9 details of when, where, or how, the alleged "partnership" was formed are offered.

10 **2. MGA's Second Cause of Action (Cal. Corp. Code § 25504.1)**
 11 **Fails To Assert "Material Assistance . . . With Intent To**
 12 **Defraud" By Defendants**

13 MGA's Second Cause of Action is brought against all Defendants and asserts
 14 an "aiding and abetting" claim under Cal. Corp. Code § 25504.1. Under § 25504.1,
 15 any person who "materially assists" in the violation of § 25401 "with intent to deceive
 16 or defraud," may be held liable. Cal. Corp. Code § 25504.1. Because this claim is
 17 rooted in fraud, it too must be pled with particularity. *See Kainos Labs.*, 1998 WL
 18 2016634, at *16.

19 **(a) MGA's Allegations Of Defendants' "Material Assistance" Fail**

20 MGA repeats the same ineffective allegations regarding "control" for its claim
 21 of "material assistance" (SAC ¶ 113 (a), (c)-(d)), in addition to a few additional (but
 22 still ineffective) allegations against all Defendants. The additional "material
 23 assistance" allegations are:

- 24 • All Defendants failed to disclose to MGA (or the governmental authorities)
 25 their alleged knowledge of Smoby's fraud. (SAC ¶ 113(b).)
- 26 • Defendants Deutsche Bank, Commerzbank, and Barclay's acquired Smoby's
 27 debt at cents on the dollar with the intent of dumping Smoby on an investor.
 28 (SAC ¶ 113(e).)

- 1 • Defendants (and their alleged representative, EOS Partners) represented
2 falsely that they would work with MGA in acquiring Smoby and would
3 discount Smoby's debt. (SAC ¶ 113(f)-(h).)
- 4 • Defendants' pursuit of payment of Smoby's debt. (SAC ¶ 113(i).)

5 MGA's assertions, however, fail to establish "material assistance."

6 First, MGA's allegation that Defendants failed to disclose information to MGA
7 is wrong as a matter of law and is without factual support. Under California law, a
8 duty to disclose is a fiduciary duty that only arises from a "fiduciary" or "confidential
9 relationship." *Persson v. Smart Inventions, Inc.*, 125 Cal. App. 4th 1141, 1160-62
10 (2005).¹⁰ A lender is not a fiduciary of, nor is it in a confidential relationship with, its
11 borrowers, and therefore has no duty to disclose. *Price v. Wells Fargo Bank*, 213 Cal.
12 App. 3d 465, 476 (1989) ("A debt is not a trust and there is not a fiduciary relation
13 between debtor and creditor as such."); *Chazen v. Centennial Bank*, 61 Cal. App. 4th
14 532, 537 (1998) (no fiduciary relationship between bank-lender and depositor-
15 borrower and bank is not liable for misappropriation of trust funds by trustee).

16 Here, MGA was not even in privity with Defendants as borrower, but was one-
17 step removed as a potential (and actual) arms-length acquirer of the lenders' borrower,
18 further straining the imposition of an alleged duty to disclose. *See Persson*, 125 Cal.
19 App. 4th at 1162 ("In the absence of evidence of any similar vulnerability or
20 incapacity, we decline to extend the scope of fiduciary obligations to an arms-length
21 negotiation for the sale of shares in a corporate enterprise."); *see also Schneberger v.*
22 *Wheeler*, 859 F.2d 1477, 1480-81 (11th Cir. 1988) (bank had no duty to disclose
23 precarious financial condition of oil and gas limited partnership); *Seattle-First Nat'l*
24 *Bank v. Carlstedt*, 678 F. Supp. 1543, 1550 (W.D. Okla. 1987) ("Under the federal
25 securities laws, a lender owes no fiduciary or other duty to borrowers or other parties
26 who invest in securities.").

27 ¹⁰ A "confidential relationship" requires a vulnerable party be in the power of a
28 stronger party, and that empowerment was solicited or accepted by the stronger party
and prevents the vulnerable party from protecting itself. *Persson*, 125 Cal. App. 4th at
1161.

1 Nor does the SAC allege facts that would infer the creation of a fiduciary or
 2 confidential relationship between Defendants and MGA. *See Das v. Bank of Am.,*
 3 *N.A.*, 186 Cal. App. 4th 727, 740 (2010) (“[A]s a general rule, a financial institution
 4 owes no duty of care to a borrower when the institution’s involvement in the loan
 5 transaction does not exceed the scope of its conventional role as a mere lender of
 6 money.”); *Nymark v. Heart Fed. Sav. & Loan Ass’n*, 231 Cal. App. 3d 1089, 1096 n.6
 7 (1991) (“[A] financial institution engaged in its conventional role as a lender of
 8 money is not liable to a third party for any financial failure of that which is
 9 financed.”); *Sierra-Bay Fed. Land Bank Ass’n v. Superior Court*, 227 Cal. App. 3d
 10 318, 334 (1991) (“A commercial lender is not to be regarded as the guarantor of a
 11 borrower’s success and is not liable for the hardships which may befall a borrower.”).

12 Additionally, MGA never alleges Defendants were involved in preparing
 13 Smoby’s allegedly fraudulent financial statements, only that Defendants had “access”
 14 to them, which MGA did as well, and which is insufficient as a matter of law. *In re*
 15 *U.S. Grant Hotel Assocs., Ltd. Secs. Litig.*, 740 F. Supp. 1460, 1465-66 (S.D. Cal.
 16 1990) (“mere receipt and review” of documents does not constitute “material
 17 assist[ance]”). As described above, MGA had actual notice of fraud at the time but
 18 failed to act until the statute of limitations had run.

19 Second, allegations that Defendants represented they would discount Smoby’s
 20 debt are not pled with sufficient detail for each Defendant.¹¹ *See Swartz v. KPMG*
 21 *LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007) (“Rule 9(b) does not allow a complaint to
 22 merely lump multiple defendants together but requires plaintiffs to differentiate their
 23 allegations when suing more than one defendant and inform each defendant separately
 24 of the allegations surrounding his alleged participation in the fraud.”); *Moore*, 885

25 ¹¹ MGA’s allegations regarding its belief that Smoby’s debt would be discounted by
 26 Defendants is refuted by the public record in France, where MGA represented to the
 27 AMF (the French SEC) that it had not reached an agreement with Defendants to
 28 discount Smoby’s debts as late as May 25, 2007 — which was after MGA had
 acquired Smoby. (RJN Ex. 9 (May 25, 2007 AMF public securities notification).)

1 F.2d at 541-42 (must allege the specific time, place, and defendant who made each
 2 alleged misrepresentation with particularity). Here, MGA fails to separately link each
 3 Defendant with a specific misrepresentation, including the date, location, presenter,
 4 and method of communication, other than the conclusory assertion that Defendants
 5 would work with MGA and would consider discounting Smoby's outstanding debt —
 6 all allegedly made by Defendants' "common" representative, EOS Partners (SAC
 7 ¶ 53), for which no facts establishing the representative relationship are pled.¹² See
 8 *Swartz*, 476 F.3d at 764-65; see also *Kruse v. Bank of Am.*, 202 Cal. App. 3d 38, 59
 9 n.15 (1988) ("assurances to work things out amount to no more than promises to
 10 continue negotiations looking to a future agreement").

11 Third, Defendants' actions to enforce their loan agreements with Smoby after
 12 MGA acquired Smoby cannot be evidence of "materially assisting" Smoby in selling
 13 itself to MGA because such enforcement post-dates the acquisition at issue and is
 14 completely appropriate. See *Nymark*, 231 Cal. App. 3d at 1093 n.1 ("A commercial
 15 lender is entitled to pursue its own economic interests in a loan transaction."); *Perlas*
 16 *v. GMAC Mortg., LLC*, 187 Cal. App. 4th 429, 436 (2010) ("A commercial lender
 17 pursues its own economic interests in lending money."); *Sierra-Bay Fed. Land Bank*
 18 *Ass'n*, 227 Cal. App. 3d at 334-35 ("[A] commercial lender is privileged to pursue its
 19 own economic interests and may properly assert its contractual rights."). Because
 20 MGA does not allege facts establishing Defendants' "material assistance," its
 21 § 25504.1 claim fails. See *Burnstein*, 1994 WL 792541, at *6-7.

22
 23
 24 ¹² Indeed, MGA pleads no facts demonstrating how EOS Partners, the alleged "agent"
 25 of Defendants who allegedly "oversaw the provision of false financial material to
 26 MGA," was ever in a legally cognizable agency relationship with Soc Gen. (SAC
 27 ¶¶ 44-45, 52-53, 57.) Such conclusory allegations of agency in a fraud-based claim
 are inadequate. See *Swartz*, 476 F.3d at 764-65; *In re Toyota Motor Corp.*, 785 F.
 Supp. 2d 883, 911 (C.D. Cal. 2011) ("Plaintiffs may not rest on legal conclusions
 regarding agency that are cast as factual allegations.").

1 **(b) MGA's Allegations Of Defendants' "Intent To Defraud" Fail**

2 Allegations of intent to defraud must be pled with particularity under Rule 9(b).
 3 *Kainos Labs Inc.*, 1998 WL 2016634, at *16; *In re Wash. Mut., Inc. Sec. Litig.*, No.
 4 2:08-MD-1919 MJP, 2010 WL 4622514, at *6 (W.D. Wash. Nov. 3, 2010). MGA
 5 fails to meet its pleading burden, offering only the conclusory allegation that
 6 Defendants "undertook these acts with intent to deceive or defraud" (SAC ¶ 115), and
 7 offering as support the bald assertions that Defendants were looking for an investor on
 8 which to dump Smoby's debt. No detailed facts supporting this inference, however,
 9 are alleged.

10 **3. MGA's Fraudulent Nondisclosure Claim Fails**

11 To state a claim for fraudulent nondisclosure under California law, MGA must
 12 allege: "(1) a misrepresentation [or nondisclosure], (2) with knowledge of its falsity
 13 [or scienter], (3) with the intent to induce another's reliance on the misrepresentation,
 14 (4) justifiable reliance, and (5) resulting damage." *Conroy v. Regents of Univ. of Cal.*,
 15 45 Cal. 4th 1244, 1255 (2009); *see Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th
 16 951, 974 (1997); *see also Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126-27 (9th Cir.
 17 2009).

18 Here, MGA raises the same conclusory assertions discussed above that
 19 Defendants had knowledge of Breuil's fraud at Smoby and purposefully did not
 20 disclose this knowledge to MGA with the intent for MGA to purchase Smoby. (*E.g.*,
 21 SAC ¶ 38 ("On information and belief, the Original Lenders were provided definitive
 22 confirmation that Smoby's financial data . . . was fraudulent.")) MGA never
 23 establishes the link, however, between its allegations of Breuil's embezzlement at
 24 Smoby with each named Defendant gaining specific knowledge of these alleged acts.
 25 Rather, MGA relies on broad allegations of "[a] longstanding banking relationship,"
 26 the offering of loans in general, and typical lender provisions in the Loan Agreements
 27 that protect lenders in order to infer Defendants' alleged knowledge. (SAC ¶ 123(a)-
 28

(j).)¹³ The shortcomings of such generic allegations have been addressed *supra*, and these allegations do not support the inference of actual knowledge.

Moreover, as part of its fraud by nondisclosure claim, MGA must also plead facts with particularity that establish that Defendants each owed MGA an affirmative duty to disclose in the first place. *See Rutledge v. Boston Woven House & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978) (fraud based on passive conduct or a failure to disclose requires allegations that a defendant owed an affirmative duty to disclose to the plaintiff). Defendants, as lenders, typically owe no such duty to their borrowers. *E.g., Price*, 213 Cal. App. 3d at 476. Here, when the alleged failure to disclose occurred, MGA was not a borrower of Defendants nor were Defendants a party to the agreement between MGA and Smoby. (SAC ¶¶ 75-76 (acknowledging MGA completed its acquisition of Smoby without finalizing an agreement with Defendants regarding Smoby's debt).) MGA therefore fails to allege facts sufficient to establish that each named Defendant owed it a duty to disclose anything suspicious about Smoby's financials, and without such a duty, no cause of action exists. *See Casey v. U.S. Bank Nat'l Ass'n*, 127 Cal. App. 4th 1138, 1152 (2005) ("[T]he complaint must allege the defendant's actual knowledge of the specific breach of fiduciary duty for which it seeks to hold the defendant liable. The [plaintiff's] general allegation the banks knew the [depositors] were involved in 'wrongful or illegal conduct' does not constitute sufficient pleading that the banks had actual knowledge [of the specific underlying fraudulent act]."); *see also Rutledge*, 576 F.2d 248 (affirming dismissal); *In re Citigroup Inc. Sec. Litig.*, 753 F. Supp. 2d 206, 245-46 (S.D.N.Y. 2010) (fraud claim dismissed for failure to allege "facts demonstrating [defendant] had a duty to disclose more detailed information"); *Kane v. Madge Networks N.V.*, No. C-96-20652-RMW, 2000 WL 33208116, at *8-9 (N.D. Cal. May 26, 2000) (Fraud claim

¹³ MGA asserts the loans provided Smoby violated California, U.S., and French law, (SAC ¶¶ 37, 123(g)), but offers no factual or legal support for this conclusory charge.

1 dismissed where “plaintiffs fail[ed] to plead any facts that would give rise to a duty to
2 disclose material nonpublic information.”).

3 Nor does the SAC allege reasonable reliance with sufficient particularity. *See*,
4 *e.g.*, *Bower v. AT&T Mobility, LLC*, 196 Cal. App. 4th 1545, 1557 (2011).

5 **4. MGA’s Conspiracy Fraud Cause Of Action Fails**

6 Under California law, “[t]o state a cause of action for conspiracy, the complaint
7 must allege (1) the formation and operation of the conspiracy, (2) the wrongful act or
8 acts done pursuant thereto, and (3) the damage resulting from such act or acts.”

9 *Cellular Plus, Inc. v. Superior Court*, 14 Cal. App. 4th 1224, 1236 (1993). Where the
10 alleged wrongful act or acts of the conspiracy are based in fraud, the elements of the
11 wrongful fraudulent acts as well as the existence of the conspiracy must be pled with
12 particularity. *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 990 (9th
13 Cir. 2006).

14 Here, MGA’s allegations fail to establish a conspiratorial agreement to commit
15 fraud, or the fraud itself as explained above, with particularity. Nowhere in the SAC
16 does MGA assert facts regarding the what, when, where, or how the alleged
17 conspiracy agreement between Defendants was formed. Instead, the SAC offers
18 sweeping conclusory statements that Defendants “participate[ed] in a scheme,” that
19 they “developed a plan,” and that there was a “conspiracy” amongst Defendants.
20 (SAC ¶¶ 14, 39, 139.) Such bald allegations are patently deficient to establish “the
21 formation and operation of the conspiracy” to defraud. *Cellular Plus, Inc.*, 14 Cal.
22 App. 4th at 1236; *Wasco Prods., Inc.*, 435 F.3d at 990.

23 **5. MGA’s Aiding and Abetting Fraud Claim Fails**

24 In California, to plead a claim for aiding and abetting fraud, MGA must allege
25 (a) an underlying fraud; (b) “actual knowledge” of that fraud; and (c) that Defendants
26 provided “substantial assistance” or encouragement to another in accomplishing the
27 fraud. *See In re First Alliance Mortg. Co.*, 471 F.3d 977, 992-95 (9th Cir. 2006); *see*
28

1 *also Casey*, 127 Cal. App. 4th at 1145 (“[A]iding and abetting depends on proof the
 2 defendant had actual knowledge of the specific primary wrong the defendant
 3 substantially assisted.”). MGA’s aiding and abetting fraud claim is therefore merely a
 4 derivative claim that fails along with MGA’s primary claim for fraud. *Richard B.*
 5 *LeVine, Inc. v. Higashi*, 131 Cal. App. 4th 566, 574 (2005); *see also Jennings v.*
 6 *Wash. Mut. Bank*, No. CIV S-10-2126-FCD-CMK, 2011 WL 775861, at *4 (E.D. Cal.
 7 Feb. 28, 2011).

8 In addition, MGA fails to plead “actual knowledge,” relying instead on its
 9 conclusory allegations of “access” to Smoby’s financials, which are based entirely on
 10 the Loan Agreement provisions. Indeed, MGA fails to specify, for each named
 11 Defendant, (i) the date each Defendant learned of the alleged fraud perpetrated by
 12 Breuil, (ii) which specific financial record was reviewed by each Defendant that
 13 provided them this actual knowledge, and (iii) how each Defendant’s review of a
 14 specific document or other specific act imputed actual knowledge of fraud, when
 15 MGA’s own lengthy review of all of Smoby’s financial records during its due
 16 diligence period did not. MGA fails to articulate facts in support of its inference that
 17 Defendants knew of Breuil’s alleged looting of Smoby and therefore fails to plead
 18 “actual knowledge.” *Casey*, 127 Cal. App. 4th at 1152.

19 Moreover, the Fifth Cause of Action parrots the Second Cause of Action, as
 20 both rely on the same allegations to establish “material” or “substantial” assistance,
 21 (*compare* SAC ¶¶ 108-116, *with* SAC ¶¶ 149-158), and fails for the same reasons.

22 V. CONCLUSION

23 For these reasons, and because MGA has already amended its complaint twice,
 24 the SAC should be dismissed with prejudice and without leave to amend.
 25
 26
 27
 28

1 Filing counsel hereby attests that concurrence in the filing of this document has
2 been obtained from the other signatories of this document.

3
4 Dated: December 23, 2011

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